warrants in courts of record in criminal proceedings are issued in accordance with forms prescribed for the municipal justice in ch. 960. (Bill 9-A)

Editor's Note: The above legislative council note was written before the enactment of ch. 255, Laws 1969.

300.20 History: 1969 c. 87; Stats. 1969 s. 300.20.

Legislative Council Note, 1969: This section adopts the same cost and fee structure as in state forfeiture actions and small claims court. Sub. (3) restates present law. (Bill 9-A)

300.21 History: 1969 c. 87; Stats. 1969 s. 300.21.

Legislative Council Note, 1969: This section is similar to present s. 960.34 which is repealed by this bill. (Bill 9-A)

Editor's Note: A predecessor statute (360.34, Stats. 1939) was construed by the attorney general in an opinion published in 29 Atty. Gen. 371.

300.22 History: 1969 c. 87; Stats. 1969 s. 300.22.

CHAPTER 310.

Probate of Wills.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 310 through 1969, including the effects of ch. 339, Laws 1969. Various provisions of ch. 310 are restated in a new probate code, effective April 1, 1971. For more detailed information concerning the effects of ch. 339, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 851.

310.01 History: R. S. 1849 c. 66 s. 12, 13; R. S. 1858 c. 97 s. 12, 13; R. S. 1878 s. 3784; Stats. 1898 s. 3784; 1925 c. 4; Stats. 1925 s. 310.01; Sup. Ct. Order, 212 W xxiii; 1969 c. 339.

310.02 History: R. S. 1849 c. 66 s. 14, 15; R. S. 1858 c. 97 s. 14 to 16; R. S. 1878 s. 3785; Stats. 1898 s. 3785; 1925 c. 4; Stats. 1925 s. 310.02; Sup. Ct. Order, 212 W xxiv; 1969 c. 339.

310.03 History: R. S. 1849 c. 66 s. 17; R. S. 1858 c. 97 s. 17; R. S. 1878 s. 3786; Stats. 1898 s. 3786; 1925 c. 4; Stats. 1925 s. 310.03; 1933 c. 190 s. 1; 1969 c. 339.

See note to 310.031, citing Will of Rice, 150 W 401, 136 NW 956.

On an appeal from a judgment on the probate of wills executed by the surviving maker of an unprobated joint will, executed by her and her husband, where it appears that knowledge of the execution and the contents of the unprobated joint will came to the county court and to counsel for the proponents and the contestants, and the record discloses no reason for the failure to probate, and where it also appears that after the death of the husband there was a conference of the parties in interest, followed by the administration of the husband's estate as an intestate estate, the supreme court must presume that there was sufficient reason for not probating the joint will. Will of Faulks, 246 W 319, 17 NW (2d) 423.

310.031 History: R. S. 1849 c. 66 s. 15, 16; R. S. 1858 c. 97 s. 16, 17; R. S. 1878 s. 4505; Stats. 1898 s. 4505; 1925 c. 4; Stats. 1925 s. 346.58; 1955 c. 696 s. 191; Stats. 1955 s. 310.031; 1969 c. 339.

Sec. 4505, Stats. 1898, establishes a public policy requiring the establishment of every valid will even though all the parties interested consent to disregard its provisions. Will of Rice, 150 W 401, 136 NW 956, 137 NW 778.

310.04 History: R. S. 1849 c. 66 s. 18; R. S. 1858 c. 97 s. 18; R. S. 1878 s. 3787; Stats. 1898 s. 3787; 1925 c. 4; Stats. 1925 s. 310.04; Sup. Ct. Order, 212 W xxiv; Sup. Ct. Order, 232 W vii; 1959 c. 290; 1969 c. 339.

On county courts see notes to various sections of ch. 253.

"Probate courts are authorized by our constitution, and by statute are given broad jurisdiction in respect to the administration of estates, and that jurisdiction attaches when invoked by the proper person, by filing a petition for administration setting up the essential facts." Estate of Walter, 183 W 540, 543, 198 NW 375, 376.

310.045 History: Court Rule II part; Sup. Ct. Order, 212 W xxiv; Stats. 1933 s. 310.045; Sup. Ct. Order, 241 W vi; Sup. Ct. Order, 258 W vi; Sup. Ct. Order, 262 W x; 1965 c. 295; 1969 c. 339.

Comment of Judicial Council, 1952: The 1952 amendment eliminates the necessity of showing names and post-office addresses of persons interested if the petition is for a statutory certificate or for an ex parte order in proceedings already pending. These matters do not require notice and the reason for showing names and post-office addresses on petitions is to advise the court as to what persons are entitled to notice and the addresses of such persons. The last sentence is taken in part from section 12 of the Model Probate Code. It is important during the early stages of operation under the new rule to avoid unfortunate loss of jurisdiction through defects. [Re Order effective May 1, 1953]

See note to 318.06, citing Estate of Steuber, 270 W 426, 71 NW (2d) 272.

Petitioner, a sister of testator, who was not an heir or named in the will, could petition for probate of the will where alterations in the will could be construed as making her a beneficiary if the alterations did not have the effect of revoking the will. Estate of Helgert, 29 W (2d) 452, 139 NW (2d) 81.

Implications of the Helgert case. 50 MLR 153.

310.05 History: 1905 c. 336 s. 1; Supl. 1906 s. 3787a; 1911 c. 663 s. 444; 1925 c. 4; Stats. 1925 s. 310.05; 1929 c. 155; 1947 c. 150; 1969 c. 339.

Where the will was on file in the county court at the time a waiver of notice of hearing of application for probate was presented, the court had jurisdiction over the parties, under (1), at the time the will was admitted to probate, although they had signed the

waiver prior to the filing of the petition for probate; and the waiver was effective since none of the parties revoked it prior to the date it was filed nor until after the will was admitted to probate. Estate of Halverson, 267 W 188, 65 NW (2d) 7.

310.06 History: R. S. 1849 c. 66 s. 19, 20; R. S. 1858 c. 97 s. 19, 20; R. S. 1878 s. 3788; 1895 c. 165; Stats. 1898 s. 3788; 1925 c. 4; Stats. 1925 s. 310.06; Sup. Ct. Order, 212 W xxiv; 1949 c. 301; 1955 c. 162; Sup. Ct. Order, 275 W ix; 1961 c. 495; 1963 c. 6; 1969 c. 339.

Comment of Advisory Committee, 1949: 310.06 deals with proof of execution of wills in uncontested cases. That section does not literally cover the situation where the only "subscribing witness" who resides in Wisconsin has become mentally incompetent to testify. Such a situation has arisen and will recur. The amendment is intended to cover such a situation by making the procedure the same as it would be if that witness were deceased instead of incompetent. The reason for admitting other evidence is the same in both situations. [Bill 30-S]

Revisor's Note, 1963: To correct a typographical error in the drafting of Ch. 162 in 1955. The last word was plural for many years and the drafting record does not indicate that any change was intended. [Bill 44-S]

In proving a will it is not proper to unite with the question of its execution the question whether or not the testator had made a valid agreement to make some other disposition of his property. Farmer v. Sprague, 57 W 324, 15 NW 382.

Where a will is executed by using a mark for a signature and is otherwise properly executed, it may be established, though contested, by the evidence of one subscribing witness and testimony that the other witness actually signed as such, together with corroborating evidence satisfying the court of compliance with all the statutory requirements, the absence of the other witness being satisfactorily accounted for. In re Jones' Will, 96 W 427, 70 NW 685, 71 NW 883.

One who is a legatee under an alleged former will of a decedent is the person aggrieved upon the probate of a later will which it is alleged was improperly admitted to probate. In re Hunt's Will, 122 W 460, 100 NW 874.

One of the 3 wills executed by the decedent within a week was offered for probate. The parties in interest were before the court. All the evidence bearing upon the mental competency of the testator and his susceptibility to undue influence was before the court. All interested parties were given an opportunity to present evidence in addition to what was offered by the proponent. No additional evidence was offered nor was it contended that any existed. Under those facts and circumstances it was competent for the court to determine the validity or invalidity of all the wills and determine whether the decedent died testate or intestate so that the court could promptly proceed with the administration of the estate. In re Kalskop's Will, 229 W 356, 281 NW 646.

Where the evidence established that a typewritten will, in the possession of the principal beneficiary at the death of the testator, had been drawn by an attorney and dated April 29, 1937, and had been delivered by him at about that time, to the testator, unexecuted, and that the executed will, when offered by the principal beneficiary for probate was torn and mutilated in such a manner as to obliterate the last numeral of the year date and as to warrant a suspicion that this has been done by someone after execution of the will, designedly to conceal the true date of execution, the trial court, on the record made, could deny probate of such will for insufficiency of convincing proof of execution subsequent to the execution of another will executed on April 7, 1938, notwithstanding testimony of attesting witnesses of the first mentioned will that it was executed in July, 1939. Will of Frederiksen, 246 W 263, 16 NW (2d) 819.

Undue influence, burden of proof, presumptions, mental impairment in will cases, are examined and decisions on the subject are examined at length in Will of Faulks, 246 W 319, 17 NW (2d) 423.

One must have some interest in the disallowance of a will in order to object to its probate; an heir may do so if he would receive more by descent in case the will was not established, and a legatee may do so if he is able to offer a prior will for probate containing a more favorable provision for him. Estate of Buffington, 249 W 172, 23 NW (2d) 517.

310.07 History: R. S. 1849 c. 66 s. 22 to 24; R. S. 1858 c. 97 s. 22 to 25; 1867 c. 165 s. 1; 1872 c. 78 s. 2; R. S. 1878 s. 3789, 3790, 3793; 1895 c. 128; Stats. 1898 s. 3789, 3790, 3793; 1925 c. 4; Stats. 1925 s. 310.07, 310.08 part, 310.13; 1929 c. 497; 1935 c. 176; Stats. 1935 s. 310.07; 1951 c. 253; 1969 c. 339.

Editor's Note: For foreign decisions construing the "Uniform Probate of Foreign Wills Act" consult Uniform Laws, Annotated.

Where a duly authenticated copy of a foreign will, with a certificate of probate in the foreign court, was presented by the executors, due notice given, record made and order allowing the will, there was a substantial compliance. Markwell v. Thorn, 28 W 548.

A creditor who claims under a foreign will devising lands in this state in trust to pay debts may have such will proved or allowed in this state. An action in equity to compel the executor to have the will probated or allowed cannot, therefore, be maintained. Wells, Fargo & Co. v. Walsh, 87 W 67, 57 NW 969.

Where it appears that a foreign will has been admitted to probate in a court of competent jurisdiction, the court of this state has no power to refuse probate because of irregularities in the probate in the court of original jurisdiction. In re Gertsen's Will, 127 W 602, 106 NW 1096.

The court has no power to grant an allowance to the widow. Will of Eaton, 186 W 124, 202 NW 309.

The county court, in which ancillary proceedings for administration of the estate of a nonresident were commenced after his will had been admitted to probate in the state of his residence, had jurisdiction and authority

to construe the will so far as it related to a devise of real estate located in the county. Will of Ruppert, 233 W 527, 290 NW 122.

In the absence of statutory provision to the contrary, the proper jurisdiction for the probate of a will, in chief, is at the place of the domicile of the testator, and the probate elsewhere should be ancillary, but a will can be admitted to probate in a competent court of any state in which an administrator could have been appointed had the decedent died intestate, and probate in a state other than at the domicile can be had although the will has not been admitted to probate in the state of the decedent's domicile. Estate of Joyce, 238 W 370, 298 NW 579.

310.075 History: 1867 c. 165; 1872 c. 58, 78; R. S. 1878 s. 2295; Stats. 1898 s. 2295; 1925 c. 4; Stats. 1925 s. 238.19; 1951 c. 594 s. 3; Stats. 1951 s. 310.075; Sup. Ct. Order, 262 W vi; 1969 c. 339.

Where the mortgagee of land in this state is a resident elsewhere the record in the county where the land is situate of an instrument purporting to be his last will and of the probate thereof in another state is not proof that the mortgagee is dead or that the person named in such instrument as executor had authority to act as such. Hayes v. Lienlokken, 48 W 509, 4 NW 584.

A foreign will devising lands in this state to an executor in trust to pay debts and the probate thereof in a foreign court do not affect the title to lands here, nor give a creditor of the testator any lien upon or interest in them until the will has been made effective by a compliance with secs. 2295, 3790 and 3793, R. S. 1878. Wells, Fargo & Co. v. Walsh, 87 W 67, 57 NW 969.

When a duly authenticated copy of a foreign will and of its probate has been handled in accordance with sec. 2295, R. S. 1878, the title passes to the trustee as effectually as if the will had been probated in this state. Wells, Fargo & Co. v. Walsh, 88 W 534, 60 NW 824.

Where it does not appear in the record that any formal order was entered admitting the will to probate, such as is usually made in the probate courts of this state, but it appears by evidence that such formal decree is not usual in a foreign state, and that the papers can be admitted in evidence in any court in that state as proving the will, it is entitled to be recorded and admitted in evidence in Wisconsin. Secs. 2295 and 3267, Stats. 1898, are entirely independent and intended to cover different situations; sec. 2295 covers cases where by the terms of the will lands are devised or authority given to convey, while sec. 3267 is intended to provide for cases where the executor or administrator must obtain judicial authority to sell or convey lands. McIntosh v. Marathon L. Co. 110 W 296, 85 NW 976.

Such recording will be as valid to pass title to lands in the county in which the record is made as if the will had been proved and allowed in a Wisconsin court. Simpson v. Cornish, 196 W 125, 218 NW 193.

310.09 History: 1919 c. 582; Stats. 1919 s. 3790a; 1925 c. 4; Stats. 1925 s. 310.09; 1969 c. 339.

310.10 History: R. S. 1849 c. 84 s. 12; R. S. 1858 c. 98 s. 14; R. S. 1878 s. 3791; Stats. 1898 s. 3791; 1925 c. 4; Stats. 1925 s. 310.10; 1969 c. 339.

The legatees, devisees and heirs are all parties to a proceeding to establish a lost will. In re Valentine's Will, 93 W 45, 67 NW 12.

Where a testator learns of the destruction of a will in time to allow him to reproduce it, such will cannot be established as a lost will, as a presumption of revocation arises. A will can only be established where it appears that there was no proper opportunity to reproduce the will. Parsons v. Balson, 129 W 311, 109 NW 136.

When a will cannot be found after the death of a testator, there arises a presumption that it has been destroyed for the purpose of revoking it. This presumption may be overcome by evidence, the burden being upon the proponent. Wendt v. Ziegenhagen, 148 W 382, 134 NW 905.

There must be the same proof of execution of an alleged or lost will as would be required in a contest over the probate of a document offered as the original. Estate of Rosencrantz, 191 W 109, 210 NW 371.

310.11 History: 1905 c. 163 s. 2; Supl. 1906 s. 3791a; 1925 c. 4; Stats. 1925 s. 310.11; Sup. Ct. Order, 212 W xxv; Sup. Ct. Order, 232 W vii; 1969 c. 339.

The notice need not be given where the court already has jurisdiction to enter a final decree. That is required only when, during the course of the administration, a petition is filed for a construction of the will. Estate of Lyons, 183 W 276, 197 NW 710.

A will must be construed to effectuate the testator's intention. First Wisconsin T. Co. v. Helmholz, 198 W 573, 225 NW 181.

In construing a will the county court had jurisdiction to determine that a trust was created thereunder for the testator's widow in accordance with an antenuptial agreement, and the judgment and determination of the court in reference thereto, not appealed from, was conclusive upon all parties. Estate of Wittwer, 216 W 432, 257 NW 626.

Under a will bequeathing in paragraph "fourth" $5,000 to the wife of the testator out of the proceeds of a life policy free from any trusts or remainders if she survived the testator, and bequeathing in paragraph "sixth" certain property to the wife in trust, and subsequently providing in paragraph "ninth" that the bequests given to the wife in trust "under paragraphs 4 and 6" should be subject to a trust in favor of a minor, the $5,000 from the proceeds of the life policy is determined to be an absolute bequest to the surviving wife, not subject to the trust subsequently created. Will of Loewenbach, 222 W 467, 269 NW 323.

In proceedings brought in the county court 35 years after the probating and recording of a will devising real estate, rulings, whereby an amendment of a description was made and a construction of the will was made which adversely affected the title of one who long prior to such proceedings had purchased from a devisee in reliance on the record as it stood at the time of purchase, were not binding on such purchaser where he had not been given

notice of the proceedings and was not a party thereto; and in a subsequent action to quiet title against such purchaser, the circuit court properly entered on a construction of the will as an original proposition to determine its effect on the purchaser's title. Malzahn v. Teagar, 235 W 631, 294 NW 36.

An unappealed judgment of the county court, made in a proceeding for the construction of a will, construing provisions relating to the treatment of debts of legatees to the testator in arriving at their proportionate shares of the estate, and adjudicating specifically as to a land contract on which a legatee was indebted to the testator, was res adjudicata in a subsequent proceeding for the construction of the will involving the same interested parties and the same subject matter. Estate of Greeneway, 236 W 503, 295 NW 761.

Whether denominated an order or a judgment, a determination of the county court, establishing the construction of a will in response to a petition under 310.11, is a "judgment," within 270.53 (1), which is appealable, and which, if not appealed from, is binding on all the parties as a final determination on the point, in the absence of fraud or imposition on the trial court. Estate of Bosse, 246 W 252, 16 NW (2d) 832.

A final judgment of the county court determining certain provisions in a will to be a devise to the testator's then surviving children, and assigning the estate in accordance with such construction, even if erroneous, in the absence of fraud or imposition on the court or want of jurisdiction, must stand and is binding on the parties interested in the estate unless reversed, modified, or set aside in accordance with the statutes governing appeals and retrials and, after the time for appeal and retrial has expired without appeal taken or retrial applied for, the court cannot reconstrue the will and alter or set aside or replace such judgment. Estate of White, 256 W 467, 41 NW (2d) 776.

Where the judgment had become finally binding, the completion of probate proceedings and distribution in the estate was required to be via termination of the trust and there could not then be a proceeding for the construction of the provisions in the will. The proper procedure was to have a construction or clarification of the judgment so far as it merely embodied provisions of the will in substantially the same language used in the will. Estate of Larson, 257 W 579, 44 NW (2d) 535.

Under a will bequeathing the residue of the testator's property, both real and personal, to his widow, to be hers during her lifetime with the privilege of using any portion of the corpus or principal, and bequeathing whatever might remain of the corpus or principal at the death of the widow to a son, a final judgment assigning the residue of the testator's personal property to the widow in trust involved a construction of the will, so that the county court had no jurisdiction to hear the widow's subsequent petition for a construction of the residuary clause of the will, filed long after the time for taking an appeal from the final judgment, and from a judgment denying the widow's petition for a correction of the final judgment, had passed. Estate of Lenahan, 258 W 404, 46 NW (2d) 352.

Where the proceeding was instituted after the time had expired within which to appeal from, or move to modify or set aside, the final judgment assigning an estate under a will creating a spendthrift trust, the county court had no jurisdiction to hear a petition of the divorced wife of a beneficiary for the construction of the will and for an order directing the trustee to pay over to the petitioner the income of such beneficiary in payment of the petitioner's claim against him for accrued alimony and support money. Estate of Austin, 258 W 578, 46 NW (2d) 861.

See note to 318.06, citing Will of Yates, 259 W 263, 48 NW (2d) 601.

See note to 318.06, citing Estate of Fritsch, 259 W 295, 48 NW (2d) 606.

A final decree, so far as assigning a share in a sum constituting the residue of the estate of the testatrix to a son of a deceased brother, as one of the residuary legatees entitled to share in the residue under the residuary clause of the will, was not a construction of the will deciding the question of who would be entitled to share, on the death of a foster daughter of the testatrix, in the remainder of a previously assigned trust fund created by another clause of the will for the benefit of such foster daughter. Will of Friend, 259 W 501, 49 NW (2d) 423.

310.12 History: R. S. 1849 c. 67 s. 1; R. S. 1858 c. 98 s. 1; R. S. 1878 s. 3792; Stats. 1898 s. 3792; 1925 c. 4; Stats. 1925 s. 310.12; Sup. Ct. Order, 212 W xxv; 1969 c. 339.

The office of executor is in the nature of a trust, in the discharge of which he acts as trustee. Scott v. West, 63 W 529, 24 NW 161.

Where a person is legally competent to act as executor and can give the required bond, objections by persons interested in the estate are not available when they go only to his temper, disposition, habits and character. Saxe v. Saxe, 119 W 557, 97 NW 187.

A nominee named in a will is not "legally incompetent," and the court cannot refuse to grant letters testamentary to him, because of objections going merely to his temper, disposition, habits and moral character, rendering him obnoxious to parties interested in the estate. The fact that a daughter, named as executrix in her mother's will, took possession of the decedent's personal property and refused to deliver it to a special administrator on demand until after consulting her attorney, that she was indebted to the estate in some unascertained amount, and that mutual distrust, dislike and unfriendliness existed between her and the other principal beneficiaries, objecting to her appointment as executrix, did not establish that she was "legally incompetent" to act as executrix and did not justify the county court in refusing to appoint her as executrix. Estate of Svacina, 239 W 436, 1 NW (2d) 780.

Where a widow, as executrix of her husband's will, had in her possession at the time of her death $16,000 admittedly belonging to the husband's estate, and her will directed her executor, who was her son, to pay such

sum to the legatees, one of whom was the son, nominated in the husband's will, the appointment of the son as administrator de bonis non with the will annexed of the father's estate, under bond of $15,000, was not an abuse of discretion. The appointment of the son was not an abuse of discretion on the ground that the son was a nonresident and had no property in Wisconsin. Will of Reimers, 242 W 233, 7 NW (2d) 857.

Where the county court determines that a nominated executor's personal interest will prevent him from performing a duty as executor which must be performed immediately, and especially where the conflict is one which the testator did not know or foresee, the county court should refuse appointment, which practice, if it cannot be supported by defining "legal incompetence" to include such conflict of interest, can be supported on the theory that the conflict of interest is a compelling ground for immediate removal, and that it would be a vain act to appoint solely in order to remove. Estate of Keske, 18 W (2d) 47, 117 NW (2d) 575.

Established principles with respect to an executor's responsibilities and duties as a fiduciary are restated in Estate of Van Epps, 40 W (2d) 139, 161 NW (2d) 278.

310.14 History: 1953 c. 300; Stats. 1953 s. 310.14; 1969 c. 339.

An executor does not become qualified to act as such by intermeddling with the estate, but only by having letters issued to him and giving bond. He cannot be compelled to act, but must accept the trust. Finch v. Houghton, 19 W 149; Batchelder v. Batchelder, 20 W 452.

Upon qualifying, an administrator or executor takes title to such property as the law vests in him, from the date of death of his decedent, and the surety on his bond is responsible for all property of the estate which the administrator or executor has possession of, or which he is required to reduce to possession. Maloney v. McCormick, 181 W 107, 193 NW 966.

Debts owing from an executor to a testator automatically become assets in the executor's hands on his acceptance of his appointment, to be treated as cash in the executor's hands, regardless of the executor's insolvency at the time of his acceptance or thereafter. Estate of Tuttle, 242 W 144, 7 NW (2d) 575.

310.15 History: 1953 c. 300; Stats. 1953 s. 310.15; 1969 c. 339.

The omission to approve the bond is a mere informality. Cameron v. Cameron, 15 W 1.

An executor who is exempted from giving a bond is personally liable to a legatee for the amount of a legacy which was a lien on the property devised, on selling the same and converting the proceeds to his own use. By accepting the devise and bequests made by the testator on condition of paying the debts and legacies as directed in the will there arose a liability as upon an implied promise to make such payments. Evans v. Foster, 80 W 509, 50 NW 410.

In case of conflict between the terms of an administrator's bond and the statute prescribing its conditions and pursuant to which it was given, the statute prevails. Coolidge v. Rueth, 209 W 458, 245 NW 186.

310.16 History: R. S. 1849 c. 67 s. 4, 5; R. S. 1858 c. 98 s. 4, 5; R. S. 1878 s. 3796; Stats. 1898 s. 3796; 1925 c. 4; Stats. 1925 s. 310.16; Sup. Ct. Order, 212 W xxv; 1969 c. 339.

Nothing precludes an extension of the time for filing the bond of an executor beyond the specified 20 days; and the acceptance and approval of the bond at a later date will operate as an extension. Schnorenberg v. Schnorenberg, 150 W 537, 137 NW 752.

310.17 History: R. S. 1849 c. 67 s. 6; R. S. 1858 c. 98 s. 6; R. S. 1878 s. 3797; Stats. 1898 s. 3797; 1925 c. 4; Stats. 1925 s. 310.17; Sup. Ct. Order, 212 W xxv; 1969 c. 339.

310.18 History: R. S. 1849 c. 67 s. 7; R. S. 1858 c. 98 s. 7; R. S. 1878 s. 3798; Stats. 1898 s. 3798; 1925 c. 4; Stats. 1925 s. 310.18; 1969 c. 339.

310.19 History: R. S. 1849 c. 67 s. 11; R. S. 1858 c. 98 s. 11; R. S. 1878 s. 3799; Stats. 1898 s. 3799; 1925 c. 4; Stats. 1925 s. 310.19; 1969 c. 339.

Trusts which depend on the personal qualifications of the executor and are reposed in confidence do not pass to an administrator with the will annexed. Estate of Besley, 18 W 451.

310.20 History: R. S. 1849 c. 67 s. 10, 12; R. S. 1858 c. 98 s. 10, 12; R. S. 1858 c. 99 s. 11, 14; 1861 c. 128; 1861 c. 284; R. S. 1878 s. 3800, 3804; Stats. 1898 s. 3800, 3804; 1925 c. 4; Stats. 1925 s. 310.20, 310.23; Sup. Ct. Order, 212 W xxv; Stats. 1933 s. 310.20; Sup. Ct. Order, 225 W vi; 1953 c. 300; 1969 c. 339.

The appointment of an administrator de bonis non with the will annexed is subject to the provisions of 311.02 (1), that administration of the estate of an intestate shall be granted to the widow, widower or heirs, or both, as the county court may think proper, etc. Will of Reimers, 242 W 233, 7 NW (2d) 857.

310.21 History: 1871 c. 140 s. 2; R. S. 1878 s. 3801; Stats. 1898 s. 3801; 1925 c. 4; Stats. 1925 s. 310.21; Sup. Ct. Order, 212 W xxv; 1969 c. 339.

310.25 History: 1913 c. 658; Stats. 1913 s. 3808a; 1925 c. 4; Stats. 1925 s. 311.04; Stats. 1933 s. 310.25; 1969 c. 339.

The provision that when a firm or corporation is named personal representative of an estate, certain persons shall name the attorney representing the estate, is inapplicable where the personal representative is an individual and does not make his attorney the attorney of the estate. Estate of Arneberg, 184 W 570, 200 NW 557.

310.25 does not apply where the testator by his will has designated the attorney to represent the executor, because of his intimate knowledge of the testator's affairs, and the corporate executor (administrator with the will annexed) is willing to employ such designated attorney as counsel. This section may have been aimed to prevent the real, or fan-

cied, evil of corporations acting as executors playing favorites in selecting counsel, thus tending to create a monopoly in probate business by such favorite counsel, but it was not aimed at preventing a corporate executor from selecting as its counsel to probate an estate the attorney whom the testator had requested in his will to be so selected. Estate of Ogg, 262 W 181, 54 NW (2d) 175.

An agreement, whereby a bank offered to employ the plaintiff as its attorney in probating estates in which the will was drawn by the plaintiff naming the bank as executor, was contrary to public policy as contravening 310.25. Pedrick v. First Nat. Bank of Ripon, 267 W 436, 66 NW (2d) 154.

A will appointing the testatrix's son as executor, and requesting, without expressing any reason therefor, that he retain a certain attorney, who had never met the testatrix before drafting her will and never saw her afterward, is construed as intending that the son should serve as executor even though unwilling to retain the attorney named; and under such construction, the county court properly denied a petition of such attorney for an order appointing him as the attorney for such executor, who had engaged other counsel and petitioned for the probate of the will. (Estate of Ogg, 262 W 181, distinguished.) Estate of Braasch, 274 W 569, 80 NW (2d) 759.

Where the attorney nominated by the next of kin represents them, and there might be a conflict between the interests of the estate and the heirs, this is sufficient cause to justify the court in refusing to appoint such attorney. Estate of Bobo, 275 W 452, 82 NW (2d) 328.

Where the will names the executor and the attorney and specifies as a reason that the attorney is familiar with the estate but does not indicate that the executor must retain the attorney or resign, the executor will not be compelled to employ the named attorney. Estate of Sieben, 24 W (2d) 166, 128 NW (2d) 443.

310.25, Stats. 1967, was aimed to prevent the real, or fancied, evil of corporations acting as executors playing favorites in selecting counsel, thus tending to create a monopoly in probate business by such favorite counsel, but was not aimed at preventing a corporate executor from selecting as its counsel to probate an estate the attorney whom testator had requested in his will be so selected. Estate of Thayer, 41 W (2d) 55, 163 NW (2d) 142.

Under 310.25, Stats. 1967, the next of kin is given the right to name the attorney to represent the estate unless good cause can be shown why this should not be done, the "good cause" exception being intended to cover instances where the counsel appointed by the heirs is not capable of handling the position to which he was appointed. Estate of Behr, 42 W (2d) 72, 165 NW (2d) 394.

Effect of testamentary designation of counsel for executor. Hagen, 31 MLR 231.

Direction to employ attorney for probate. 36 MLR 211.

Effect of designation of attorney for executor. 48 MLR 415.

310.27 History: 1883 c. 220; 1887 c. 180, 352; Ann. Stats. 1889 s. 1771; Stats. 1898 s. 1771a; 1923 c. 291 s. 3; Stats. 1923 s. 180.03; 1927 c. 534 s. 3; 1951 c. 731 s. 3; Stats. 1951 s. 182.003; 1955 c. 661 s. 11; Stats. 1955 s. 310.27; 1969 c. 339.

CHAPTER 311.

Administration and Administrators.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 311 through 1969, including the effects of ch. 339, Laws 1969. Various provisions of ch. 311 are restated in a new probate code, effective April 1, 1971. For more detailed information concerning the effects of ch. 339, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 851.

311.01 History: R. S. 1849 c. 68 s. 2; R. S. 1858 c. 99 s. 2; R. S. 1878 s. 3806; Stats. 1898 s. 3806; 1925 c. 4; Stats. 1925 s. 311.01; 1933 c. 190 s. 3; 1969 c. 339.

On county courts see notes to various sections of ch. 253.

Domicile once acquired is not lost by removal until another is acquired. Kellogg v. Winnebago County, 42 W 97.

The action of the court in granting letters of administration was not void for lack of jurisdiction where a will was afterwards discovered. Such letters can be revoked after the discovery of the will and all acts of the county court inconsistent with the administration of the estate under the terms of the will can also be revoked, but not on the ground that they were void for lack of jurisdiction but because they were erroneous. Perkins v. Owen, 123 W 238, 101 NW 415.

Secs. 2443 and 3806, Stats. 1898, confer jurisdiction upon the county court to act (1) when it is shown that an inhabitant of or resident in the same county has died, and (2) when it is shown that a person has died without the state having any estate within such county to be administered. Barlass v. Barlass, 143 W 497, 128 NW 58.

The county court had jurisdiction to deny probate of a will and administer the estate as intestate, where objection to such will had been filed, the issue thus made had been tried upon the evidence, and all parties interested had appeared and admitted the invalidity of the will. First T. Co. v. Holden, 168 W 1, 168 NW 402.

Where the personal debts and the funeral expenses of a deceased partner have been paid, the partnership debts discharged by a new partnership, and all the equitable and beneficial owners of the estate have assigned their interests in their distributive shares, there is no estate to administer. Estate of Kuntz, 196 W 344, 220 NW 206.

In the absence of proceedings for the administration of the mother's estate, it was permissible in the administration of the estate of the son to decree distribution of the one-half share of the mother therein directly to her 9 surviving children, subject, however, to the payment of debts of the mother and the expense of her funeral and grave marker, and payments on account thereof were properly allowed the administrator in adjudging